No. 89-1625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF BURLINGTON, and ROBERT WHALEN,
Operations Manager of Parks &
Recreation Department,
Petitioners,

v.

MARK A. KAPLAN, ESQ., RABBI JAMES S. GLAZIER,
and REVEREND ROBERT E. SENGHAS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE VERMONT ORGANIZATION FOR JEWISH EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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May 18, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Establishment Clause prohibits a municipality from voluntarily permitting a private group to display its menorah at a public park that is a "traditional public forum" and that has previously been used, with official permission, for religious activities.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS*	1
REASONS FOR GRANTING THE WRIT	2
1. The Case Presents an Issue on Which This Court Was Evenly Divided	2
2. There Is Now a Conflict Among Circuits on the Central Constitutional Issue	3
3. The Decision Below Conflicts With This Court's Recent Ruling	4
4. The Issue Is a Recurring One	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

American Civil Liberties Union v. Wilkinson, 895 F.2d 1098 (6th Cir.), *petition for rehearing and for rehearing en banc denied*, 1990 U.S. App. LEXIS 7177 (April 17, 1990) 3
Board of Trustees v. McCreary, 471 U.S. 83 (1985) 2
Chabad v. City of Pittsburgh, 110 S. Ct. 708 (1989) 4, 5
County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989) 4, 5
McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Board of Trustees v. McCreary*, 471 U.S. 83 (1985)..... 2
Smith v. County of Albemarle, 895 F.2d 953 (4th Cir.), *petition for rehearing and for rehearing en banc denied*, 1990 U.S. App. LEXIS 6219 (March 28, 1990) 3, 4
Widmar v. Vincent, 454 U.S. 263 (1981) 3

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This brief is filed pursuant to Rule 37.2 of the Rules of this Court with the consent of the parties.

INTEREST OF THE *AMICUS*

The *amicus* is the private organization that has sponsored the menorah maintained at Burlington's City Hall Park since 1984. It is undisputed that City Hall Park is a "traditional public forum," and has a long history of unrestricted access for all types of free speech activities, including religious displays and activities and the erection of symbols by private groups. The *amicus* organization

seeks to instill pride among Americans of the Jewish faith, and the privately sponsored display of a menorah at a public forum is an important means of generating such pride and self-respect within a minority religious community.

The City authorities have allowed some of Burlington's Jewish citizens to display a religious symbol at a location that must, by law, be open to the expression of peaceful private opinions. The First Amendment guarantees access to that site for speech having religious content, just as it guarantees access for secular speech. We believe that it amounts to discrimination against religion for a court to overturn the permission granted by the City to maintain a menorah at such a public forum.

REASONS FOR GRANTING THE WRIT

1. *The Case Presents an Issue on Which This Court Was Evenly Divided.*—In *Board of Trustees v. McCreary*, 471 U.S. 83 (1985), this Court divided evenly on the question whether a religious group has a First Amendment right to maintain a religious display at a traditional public forum. In the *McCreary* case, the local authorities refused to permit a privately sponsored creche to be erected in a public park. The court of appeals thereafter ruled that the Constitution did not permit discrimination against speech with religious content, so that a location generally available for private expression must be made available for displays such as a creche. *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984). This Court granted certiorari and affirmed, after argument, by an equally divided Court.

The majority of the court below ruled that religious expression could be barred from Burlington's City Hall Park—traditionally a public forum—because the park is "not any city park, but rather City Hall Park" (Pet. App. 14). In other words, access to the most important of Burlington's public forums may constitutionally be denied to those engaged in religious expression. This conclusion

is, we submit, contrary to this Court's decision on *Widmar v. Vincent*, 454 U.S. 263 (1981), and it erroneously decides the issue left unresolved by this Court's even division in *McCreary*.

2. *There Is Now a Conflict Among Circuits on the Central Constitutional Issue.*—The decision of the majority below was explicitly disapproved in the recent decision of the Court of Appeals for the Sixth Circuit in *American Civil Liberties Union v. Wilkinson*, 895 F.2d 1098, 1102 (6th Cir.), *petition for rehearing and for rehearing en banc denied*, 1990 U.S. App. LEXIS 7177 (April 17, 1990). The Sixth Circuit case concerned, *inter alia*, access to the grounds of Kentucky's state capitol, which were being used for live nativity presentations. A majority of the Sixth Circuit panel held that an "equal access" policy—under which religious groups and non-religious groups have the same right to use the public forum—is consistent with the Establishment Clause. 895 F.2d at 1102. Such equal availability, said the majority, sends a message "to Christians and non-Christians alike . . . the Commonwealth offers equal opportunity encouragement for the celebration of whatever winter holiday any responsible citizen, or civil group, or religious group may wish to observe." 895 F.2d at 1104.

Although the Sixth Circuit majority asserted that its case, unlike the subject of the present petition, concerned a symbol that "is itself a public forum" (895 F.2d at 1103), the majority expressly noted that the dissent of Judge Meskill in the present case was "persuasive" (895 F.2d at 1102). It is plain, we submit, that under the reasoning of the majority of the court below, the result reached by the majority of the Sixth Circuit could not stand.

The same issue has also split the Court of Appeals for the Fourth Circuit. A majority of the original panel in *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), agreed with the majority of the court below. *See*

895 F.2d at 960, n.8. The Fourth Circuit case also involved a traditional public forum, and the issue was whether a privately financed creche could be displayed at such a public forum. Although two judges held that it could not, the dissenter concluded that a religious display, accompanied by an appropriate disclaimer, "at a location where other groups have been allowed to convene and/or erect displays" does not amount to an impermissible governmental endorsement of religion. 895 F.2d at 961.

Three of the Fourth Circuit's judges (Russell, Widener and Wilkins, C. JJ.) voted to rehear the *Albemarle County* case *en banc*. Five judges voted to deny rehearing and two recused themselves. 1990 U.S. App. LEXIS 6219 (March 28, 1990). Hence the issue has resulted in a significant division within the Fourth Circuit and in disagreement among the circuits.

3. *The Decision Below Conflicts With This Court's Recent Ruling.*—In *Chabad v. City of Pittsburgh*, 110 S. Ct. 708 (1989), the issue was whether Pittsburgh could constitutionally refuse to permit display of the same menorah that had been held to be constitutionally permissible (when erected with the city's approval) in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989). In a hearing in the district court, the plaintiff had established that the location of the Pittsburgh menorah was a "public forum," and the court had entered a finding to this effect. On this ground, the trial court had ordered the city to permit display of the menorah.

After the court of appeals stayed the district court's order, Justice Brennan overruled the court of appeals. The issue presented to the full Court by Pittsburgh on its motion to overrule Justice Brennan's order was whether the city could be directed to permit this use of a "public forum" for a privately financed religious display. The Court ruled, 6-to-3, that the district court's order should be given effect. 110 S. Ct. 708 (1989).

The ruling of the majority of the court of appeals in this case conflicts with the ruling of the majority of this Court in the *Chabad* case. The symbol is the same in both cases—a large menorah. The proximity of the symbol to the seat of government in the *Chabad* case was even closer than its proximity in this case. Nonetheless, in the *Chabad* case, the display was held to be not only constitutionally permissible but the city was denied authority to bar that display from its public forum.

To be sure, the *Chabad* case concerned a menorah display next to a Christmas tree. But while this circumstance may have been important in the original decision in *Allegheny County*, it was not the dispositive factor in the *Chabad* case. In the latter litigation, the central question concerned the "public forum" and whether a religious group could be denied access to such a forum.

4. *The Issue Is a Recurring One.*—It is important that this Court consider and decide whether menorahs and other displays of religious faiths may be maintained solitarily on public forums. In scores of cities around the country Jewish private groups affiliated with Chabad apply each year to erect and display menorahs at public forums. Their applications are most commonly granted, and the result is a commendable display at many municipal centers of the religious diversity that has made this country strong and has caused it to be a model of religious freedom throughout the world. Indeed, a large "national menorah" is displayed each year, with the permission of the United States Park Service, on the ellipse on Lafayette Park in Washington, D.C.

If the decision below is permitted to stand, municipal authorities will assume that they must forbid religious displays in traditional public forums. The result will be a wholly unjustified suppression of religious expression in public forums otherwise open to all types of speech. Such hostility to religion is not compelled by the First Amendment.

CONCLUSION

The court below has construed the Establishment Clause so broadly as to require a municipality to discriminate against a religious group seeking equal access to a traditional public forum. This holding plainly violates the fundamental First Amendment principle that government may not regulate or censor private speech in a traditional public forum based on the content of the speech. A writ of certiorari should be granted to review the decision of the court of appeals and that decision should be reversed.

Respectfully submitted,

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